

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Microscope Associates, Inc.)	
)	File No. CCB/CPD 97-51
Petition for Declaratory Ruling)	
Concerning Resale of Internet Access)	
Services)	

ORDER

Adopted: June 10, 2004

Released: June 10, 2004

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On July 7, 1997, Microscope Associates, Inc. ("MAI") filed a petition seeking an "interim order by authority of 47 U.S.C. § 203(b)(2) to the effect that: No tariff or customer subscription agreement of a telecommunications carrier may prohibit redistribution or resale of Internet service."¹ In a Public Notice,² the Commission established a pleading cycle and indicated that the petition would be treated as a petition for declaratory ruling pursuant to section 1.2 of the Commission's rules.³ For the reasons explained below, we deny the petition.

II. BACKGROUND

2. MAI filed the petition to compel Continental Cablevision ("Cable Operator")⁴ to modify or waive certain terms and conditions of its cable modem service offering. MAI, a non-profit corporation performing scientific research, sought permission from the Cable Operator to resell the cable modem service for purposes of a demonstration project at the Dedham Historical Society in Dedham, Massachusetts. Specifically, MAI planned to create a bulletin board system designed to serve up to 100 subscribers (any Dedham Historical Society member) dialing in on up to eight telephone lines.⁵ The

¹ Letter from Frederick W. Martin, President, Microscope Associates, Inc., to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission, File No. CCB/CPD 97-51, filed June 7, 1997 ("MAI Petition").

² See Public Notice, *Petition for Rulemaking Filed*, File No. CCB/CPD 97-51, 13 FCC Rcd 5937 (1997), *corrected* Public Notice, *Errata for Petition Filed by Microscope Associates, Inc.*, 1997 WL 57493 (rel. October 16, 1997).

³ 47 C.F.R. § 1.2. On October 28, 1997, MAI filed a petition requesting an extension of the reply comment filing deadline. In a Public Notice released on October 31, 1997, the Commission granted MAI's request and extended the deadline for filing reply comments to December 4, 1997. Public Notice, *Extension of Reply Comment Period for Petition filed by Microscope Associates, Inc.*, File No. CCB/CPD 97-51, 12 FCC Rcd 17625 (1997).

⁴ The cable system has changed ownership numerous times since the petition was filed. For convenience, we refer to the operator of the cable system as the "Cable Operator."

⁵ MAI Petition at 2.

demonstration project was to be funded by a proposed grant from the National Science Foundation.⁶

3. The Cable Operator's subscriber agreement described the service provided as "a cable programming service for personal use" and stipulated that the subscriber must agree "not to resell or redistribute access to the service in any manner" and that "[t]he prohibition on resale or redistribution of access includes, but is not limited to the provision of e-mail, FTP and Telnet access."⁷ In letters to the Cable Operator, Dr. Frederick Martin, President of MAI, requested a modification or waiver of this restriction so that MAI could redistribute the service to members of the Dedham Historical Society as described above.⁸ The Cable Operator denied the request on the ground that it did not want "many local computers attached to the cable, each of which redistributes Internet access."⁹ It stated that it offered cable modem service only to residential subscribers, and that a business service was not scheduled to be available until the winter of 1998.¹⁰ Accordingly, MAI was unable to secure the service arrangements it sought from the Cable Operator.

4. On July 7, 1997, MAI filed the petition with the Commission, stating that it sought a ruling as an "interim stopgap" while the Commission proceeds with the *Internet Access and Information Service Provider* rulemaking proceeding in CC Docket No. 96-263.¹¹ MAI requests that the Commission require the Cable Operator to connect its cable system to local telephone lines so that MAI may make a "combined, efficient use of the long-distance, incoming cable and local, outgoing telephone lines" as part of its innovative plan to deliver a low-cost dial-up Internet access service.¹² MAI states that its proposal would offer a new technology and service to the public, and therefore should be encouraged pursuant to section 7 of the Act.¹³ Further, the petition states that prohibitions on redistribution or resale are inconsistent with the obligation of telecommunications carriers to interconnect under section 251 of the Act and would impede the proper development of the Internet in violation of section 230 of the Act.¹⁴ Three parties submitted comments and four parties filed reply comments.¹⁵

5. In response to a recent FCC staff inquiry on the possibility of combining the MAI Petition with pending rulemaking proceedings examining either the regulatory obligations of wireline broadband or cable modem service providers,¹⁶ the petitioner indicated that the particular project that gave rise to the

⁶ *Id.* at 1.

⁷ *Id.*, Attachment 1, "Service Agreement for Highway 1 Cable Internet Access Service," at 2, para. 11.1.

⁸ *Id.* at 2-3.

⁹ *Id.* at 3; *see also* U S WEST Comments at 3 (the Cable Operator informed Dr. Martin that it would not offer him the cable Internet access service if he intended to resell the service to become an Internet Service Provider).

¹⁰ MAI Petition at 2.

¹¹ *Id.* at 3; *see also* *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review For Local Exchange Carriers*, CC Docket No. 94-1, *Transport Rate Structure and Pricing*, CC Docket No. 91-213, *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996).

¹² MAI Petition at 4-5.

¹³ *Id.* at 5-6, 8 (citing 47 U.S.C. § 157).

¹⁴ *Id.* at 6-8 (citing 47 U.S.C. §§ 251, 230).

¹⁵ Comments were filed on October 20, 1997, by U S WEST, Inc., the Commercial Internet Exchange Association, and a coalition of cable operators. Reply comments were filed on December 4, 1997, by MAI, Time Warner Cable, Bell Atlantic, and SBC Communications. Except for MAI, all parties filing in this proceeding oppose the petition.

¹⁶ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*"); *Inquiry Concerning High-Speed Access to the Internet Over Cable And Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling*, (continued....)

Petition had not gone forward and that “Microscope Associates, Inc. is a shell of itself and my personal activities are focused in other areas.”¹⁷ Nonetheless, the petitioner indicated that he believed the Petition raised important issues and would prefer a ruling on the Petition standing alone, rather than having it combined with the ongoing rulemakings.¹⁸ The petitioner also indicated that if the matter were to be combined with a rulemaking, he preferred combining the MAI Petition with the *Cable Modem* proceeding rather than the *Wireline Broadband* proceeding. The letter attached a filing intended to respond the Notice of Proposed Rulemaking concerning the regulatory obligations of cable modem service providers issued as part of the *Cable Modem Declaratory Ruling*.¹⁹

III. DISCUSSION

6. Under section 1.2 of its rules, the Commission “may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.”²⁰ It is well-established that the Commission has broad discretion whether to issue such a ruling.²¹ In this case, we decline to grant the requested ruling.

7. The regulatory obligations that apply to the cable modem service provided by the Cable Operator depend on whether it is classified as a “telecommunications service,” an “information service,” or a “cable service” under the Act.²² The Commission already has dealt extensively with issues related to the regulatory classification of cable modem service in the *Cable Modem Declaratory Ruling*. In that

(...continued from previous page)

Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”).

¹⁷ See Letter from Frederick Martin, Microscope Associates, Inc. to Steven Morris, Deputy Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, File No. CCB/CPD 97-51 (filed Feb. 24, 2004) (*Martin Letter*).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 47 C.F.R. § 1.2.

²¹ *Id.* (the Commission “may” issue a declaratory ruling terminating a controversy or removing uncertainty). See also 5 U.S.C. § 554(e) (an agency, in its sound discretion, *may* issue a declaratory order to terminate a controversy or remove uncertainty) (emphasis added); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission did not abuse its discretion by declining to grant a declaratory ruling); *Revision of Part 22 of the Commission’s Rules Governing The Public Mobile Services*, CC Docket No. 92-115, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 7463, 7465, para. 5 (2000) (Commission declines to issue a declaratory ruling when it has dealt extensively with the subject of the petition in another proceeding); *Petition of Nevadacom for Expedited Declaratory Ruling that Telegraphic Money Order Service is an Information (Enhanced) Service and Not Subject to State Regulation*, CC Docket No. 00-21, Order, 15 FCC Rcd 7567, 7568, para. 2 (Com. Car. Bur. 2000).

²² The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). “Telecommunications” is defined in turn as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). “Cable service” is defined in the Act as: (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. 47 U.S.C. § 522(6).

order, the Commission concluded that cable modem service is properly classified as an interstate information service, not as a cable service or a telecommunications service.²³ In the companion Notice of Proposed Rulemaking, the Commission sought comment on what regulatory obligations, if any, should attach to providers of this service.²⁴

8. In October 2003, the United States Court of Appeals for the Ninth Circuit rejected the Commission's classification of cable modem service as an interstate information service.²⁵ Relying on its earlier decision in *AT&T v. City of Portland*,²⁶ the court held that cable broadband service is not a "cable service" but instead is part "telecommunications service" and part "information service."²⁷ The court affirmed the Commission's decision in the *Cable Modem Declaratory Ruling* that cable modem service is not "cable service" but vacated and remanded the Commission's determination that cable modem service is classified as an interstate information service with no separate offering of telecommunications service.²⁸ The court denied the Commission's request for rehearing and the Commission and the Solicitor General are considering whether to petition for review by the Supreme Court.²⁹

9. Because the MAI Petition raises issues that were addressed in the *Cable Modem Declaratory Ruling*, we find that proceeding to be the more appropriate forum for any future consideration of these issues. Until the appellate review process is complete and the appropriate classification of cable modem services is determined, issuance of the requested declaratory ruling is not appropriate under section 1.2 because such a ruling would neither terminate a controversy nor remove uncertainty.³⁰ Following appellate review and any proceedings on remand, however, it is likely that petitioner's rights and obligations would be clarified. Consequently, for the reasons set forth above, we deny the petition for declaratory ruling, without prejudice, and terminate the proceeding.

²³ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, 4819, paras. 7, 33.

²⁴ *Id.* at 4839, para. 72.

²⁵ *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003).

²⁶ In *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit held that cable modem service did not qualify as a "cable service" and that it contained both information service and telecommunications service components.

²⁷ *Brand X Internet Services v. F.C.C.*, 345 F.3d at 1132.

²⁸ *Id.*

²⁹ The Commission and the Solicitor General must decide whether to seek Supreme Court review by June 29, 2004. If such review is not requested, the court's mandate will issue on June 30, 2004.

³⁰ It is the Commission's policy not to issue abstract rulings of law in the absence of a controversy or uncertainty. See, e.g., *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, First Order on Reconsideration, 15 FCC Rcd 7207, 7216, para. 22, n. 43. We note that the controversy between MAI and Cable Operator that prompted the filing of the petition no longer exists. See *MAI Letter* at 1 (stating that MAI is "a shell of itself" and that it is not pursuing the project described in the petition).

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 251, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Microscope Associates, Inc.'s Petition for Declaratory Ruling IS DENIED, without prejudice, and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Maher, Jr.
Chief, Wireline Competition Bureau